NARUC

EX PARTE OR LATE FILED

December 14, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: **Ex Parte Comments:** Two Originals filed in the following dockets:

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98

In the Matter of Bell Atlantic Telephone Companies Tariff FCC No. 1 Transmittal No. 1076 (CC Docket No. 98-168)

In the Matter of Pacific Bell Telephone Company Tariff No. FCC 128 Transmittal No. 2007 CC Docket No. 98-103

In the Matter of GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148, CC Docket No. 98-79

In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, File No. CCB/CPD 97-30

In the Matter of Bell South Telecommunications, Inc.; Bell South Tariff FCC No. 1; Bell South Transmittal No. 476, CC Docket No. 98-161

Dear Madam Secretary,

This letter is intended to comply with the FCC's rules on ex parte communications. The National Association of Regulatory Utility Commissioners ("NARUC") respectfully requests the FCC grant any waivers needed to allow this filing out-of –time.

On October 30, 1998, the FCC issued an order approving GTE xDSL tariff ("xDSL Order). On both October 29 and 30 of that week, I contacted all 5 FCC Commissioner's offices and either spoke directly to the common carrier bureau assistant or left that assistant voice mail or both. On November 2nd, 3rd, and 4th, I made a similar round of calls – either talking with the same assistants or leaving voice mails. Commissioner Bob Rowe and Commissioner Joan Smith made similar calls to most of the same assistants on the same days.

During these calls, the Commissioners and I strongly suggested that the FCC delay any issuance of an order addressing the jurisdictional nature of traffic terminated to internet service providers on the public switched network. Aside from the arguments discussed elsewhere in this letter, we strongly suggested the FCC consider discussing both the GTE and any related orders with the members of the National Association of Regulatory Utility Commissioners at their November meetings before taking any additional action.

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During the course of the NARUC meetings in Orlando, Florida, on Sunday, November 8, 1998, the NARUC Communications Committee had a special closed session with certain FCC representatives to discuss their concerns.

The following were present during parts of that discussion and signed a roll sheet:

FCC Commissioners: Susan Ness, Harold Furchtgott-Roth,

FCC Staff: Jim Schlicting, Kathy Brown, Larry Strickling, Lisa Zaina, Carol Mattey, Jim Casserly, Paul Gallant, Kyle Dixon,

RUS: Christopher McLean, Ed Cameron

NTIA: James McConnaughey

State Commissioners: Bob Rowe (MT), Julia Johnson (FL), Joan Smith (OR), JoAnn Sanford, (NC), Laska Schoenfelder (SD), Susan Wefold, (ND), Tom Welch (ME), Jack R. Goldberg, (CT), Walter L. Challenger, (US Virgin Islands), David Rolka (PA), Pat Wood, III (TX), Bill Gillis, (WA), Steven Mecham (UT), Allan Thoms (IA), Jim Posey (AK), Tom Dunleavy (NY)

State Staff: Jeff Richter (WI), Barney Spector (CT) , Ingo Henningsen (UT), Sandra Adams (IA), Carl Johnson (NY), Penny Rubin (NY), Peter Blum(VT), Myra Karegianes (IL), Pat McLarney (IL), Vivian Witkind Davis (NRRI), Ed Rosenberg (NRRI), Joe Witmer, (PA), Diane Munns (IA), Sandy Ibaugh (IN), Cynthia Van Landuyt (OR), Samuel Loudenslager (AR), Charlie Bolle (NV), Lori Kenyon (AK), Joel Shifman (ME), Tom Behner (KS), Judy Ripley (IN), Gregory Fogelman (FL PSC) and J. B. Ramsay (NARUC).

TIAP: Carol Weinhaus

During that session, the FCC summarized and explained the GTE xDSL order that issued October 30th. Much of the discussion focused on the xDSL order and its possible impact. FCC staff also suggested the FCC was considering a further order and rulemaking to address the jurisdictional character of internet traffic on the public switched network.

With respect to the xDSL order, State members present raised concerns about dual tariffing issues, the appropriate allocation of costs and revenues, and broader jurisdictional issues raised by the language in the decision. NARUC's November 30, 1998 filed request for reconsideration of that order provides a more detailed overview of the State concern's touched upon during that meeting. A copy of that pleading is attached..

With respect to the proposed order and rulemaking mentioned in the xDSL order, in this and subsequent contacts, NARUC Staff and some Commissioners continue to suggest the following:

(1) the FCC should, at a minimum, delay issuance of any subsequent orders until after the Supreme Court acts in the *Iowa Utilities Board v. FCC* appeal;

(2) State commissions do not need any further FCC orders to protect their existing approved orders/agreements allowing for reciprocal compensation for ISP traffic or to protect their authority to continue to arbitrate reciprocal compensation issues;

(3) incumbents essentially won the first round of arbitrations on the compensation issue and are adequately positioned to protect their interests in subsequent negotiations;

(4) intervention at this time by the FCC via additional orders could well skew negotiations in favor of one party to these negotiations; the market and the negotiations can work to resolve any problems or distortions;

(5) the xDSL order, and any related orders, could directly affect issues currently pending before, and under active discussion by, the separations joint board;[1]

Subsequently on November 20, 1998, Jeff Richter (WI) and I had a conference call with Jim Schlicting, Deputy Chief, of the Common Carrier Bureau. During that call we informed him that NARUC might well seek reconsideration of the xDSL order and again reiterated the 5 proceeding arguments for why the FCC should take no further action. Later that day, I briefly discussed the same points with Larry Strickling and Jim Casserly at the FCC.

Commissioner Joan Smith (OR) also made the following follow-up calls reiterating one or more of the points listed above: (1) November 20, 1998 – voice mail messages to Paul Gallant, Kyle Dixon, and Paul Gallant, conversation with Paul Gallant (2) November 30, 1998 conversation with FCC Commissioner Gloria Tristani, and subsequently with Tom Power, (3) December 7, 1998 conversation with Paul Gallant, > Paul

On November 18, 19, 20 and 23, I left voice mail or talked with Jim Casserly, Paul Gallant, Tom Power, and Paul Jackson, re-interating NARUC's previously stated positions and asking the FCC again to defer any additional action pending the Supreme Court's decision in the *Iowa* case. On December 11, 1998, I discussed NARUC's position again with Paul Gallant.

Respectfully Submitted

James Bradford Ramsay
NARUC Assistant General Counsel

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[1] In my specific conversations with Mr. Schlicting I also pointed out that the 10% rule – a rule of cost allocation – appears to be misapplied in the GTE xDSL order to establish jurisdiction and that the Georgia MemoryCall Case, and other orders cited in the xDSL order are not directly applicable to ISP traffice as the "end-to-end" analysis in those orders was applied to traffic that originated and terminated on the public switched network.- carried by common carriers.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20544

In the Matter of	)	
	)	
GTE Telephone Operating Cos.	)	**CC Docket No. 98-79**
GTOC Tariff No. 1	)	
GTOC Transmittal No. 1148	)	

REQUEST FOR CLARIFICATION AND/OR RECONSIDERATION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, the National Association of Regulatory Utility Commissioners ("NARUC") respectfully seeks clarification and/or reconsideration of the Memorandum Opinion and Order ("Order") adopted and released October 30, 1998 in the above-captioned proceeding.

Specifically, NARUC respectfully requests the FCC do the following:

- Clarify that its Order does not preclude States from requiring intrastate tariffs of xDSL services designed to connect end-users to Internet Service Providers ("ISPs");
- Clarify that the cost allocation procedures associated with this special access tariff remain in effect until the Separations Joint Board makes a recommendation on any needed revisions and the FCC acts on that recommendation; and
- Either disclaim the rationale proposed for allowing the tariff to go into effect or, at a minimum, clarify that the rationale presented is tentative, subject to further proceedings at the FCC, and in any case, is strictly limited to this docket, and does not act in any way to foreclose or channel the determinations currently pending before the Separations Joint Board.

In support of these requests, NARUC states as follows:

I. Discussion

A. *The FCC Should Clarify The Order Does Not Preclude States From Requiring Intrastate Tariffs Of xDSL Services Designed To Connect End-Users To ISPs.*

The GTE tariff that is the subject of the October 30 Order, like several other recent Bell Operating Company ("BOC") filings, is designed for ISPs to request xDSL service on behalf of end-users. The ISP can then provide those end users with relatively high speed connections to the ISP's services. The Commission suspended GTE and the BOC's tariffs and solicited comment on the question of whether such services are interstate offerings that can be tariffed at the Federal level.[1]

NARUC appreciates the Commission's efforts to address the controversies engendered by these applications. There are, however, numerous ramifications to the jurisdictional treatment of Internet access whether delineated by facilities, lines, calls or special access services. State commissions and NARUC have also been very active in pursuing resolution of these controversies. Indeed, some of NARUC's member commissions either currently have under investigation the filing of *intrastate* tariff arrangements like the one approved by the FCC in the October 31 Order or are considering such action.

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1 See, Bell Atlantic Telephone Co, Order Designating Issues for Investigation, CC Docket 98-165, DA 98-1863 (rel. Sept. 15, 1998); Pacific Bell Telephone Co., Order Designating Issues for Investigation, CC Docket No. 98-103, DA 98-1772 (rel. Sept. 2, 1998); BellSouth Telecommunications, Inc., Order Suspending Tariff and Designating Issues for Investigation, CC Docket 98-161, DA 98-1734 (rel. Sept. 1, 1998); GTE Telephone Operators, Order Designating Issues for Investigation, CC Docket 98-79, DA 98-1667 (rel. Aug. 20, 1998).

NARUC believes that interstate and intrastate tariffs may be filed for the loop and service configurations in the GTE/BOC tariffs. However, the Order does not seem clear on this issue. Some language can be read to suggest that the subject GTE tariff can *only* be lawfully filed and approved in the interstate jurisdiction. During NARUC's November Annual Convention in Orlando, Florida, the October 30 Order was the topic of some discussion. Because of, *inter alia*, questions received from member commissions, NARUC's counsel asked FCC representatives if the language in the Order was intended to preclude *dual tariffing* of the subject GTE and related xDSL services. The clarifications received about the Order's intent were helpful but informal. As a prophylactic measure, to forestall questions about State authority to require the filing of intrastate tariffs for xDSL services, *NARUC respectfully requests the FCC formally clarify that its Order does not preclude States from requiring intrastate xDSL tariffs for loop and service configurations like, and specifically including, the one at issue in this proceeding.*

B. The FCC should clarify that the Part 36 separation rules for special access tariffs remain in effect for GTE's tariff until the Separations Joint Board issues a recommendation on any needed revisions and the FCC acts on it.

1) The current separations rules require direct assignment of "special access" line costs to the relevant (in this case – interstate) jurisdiction.

Section 36.154, of the FCC's rules, 47 C.F.R. § 36.154, titled " Exchange line Cable and Wire Facilities (C&WF) -- Category 1 -- apportionment procedures," governs the allocation of the costs of C&WF between jurisdictions with respect to all special access tariffs, including the one posed by GTE here. Section 36.154(a) requires the carrier to determine the average cost per working loop by dividing the total cost of exchange line cable and wire Category 1 in the study area by the sum of the working loops described in subcategories 1.1,1.2,and 1.3. Subcategory 1.1 deals with intrastate private lines and mixed use facilities with less than 10% interstate usage.[2] Subcategory 1.3 deals with switched access services.[3]

Subcategory 1.2 deals with "Interstate private lines and interstate WATS lines" and is the subcategory that applies to GTE's tariff. It is defined as follows:

"This subcategory *shall include all* private lines and WATS lines that carry exclusively interstate traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line."

According to § 36.154(b):

"The costs assigned to subcategories 1.1 and 1.2 shall be directly assigned to the appropriate jurisdiction."

In the case of GTE's xDSL tariff, that is the interstate jurisdiction.

In addition, aside from CW&F, there could be as many as three other components necessary to complete an xDSL circuit – Tandem Switching Equipment (Category 2), Local Switching Equipment (Category 3), and Circuit Equipment (Category 4) which the rules also require be directly assigned to the interstate jurisdiction. See, 47 C.F.R. § 36.1(c) and § 36.124(b)(1998).

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[2] Subcategory 1.1 is defined as "State private lines and state WATS lines. This subcategory shall include all private lines and WATS lines carrying exclusively state traffic as well as...private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes ten percent or less of the total traffic on the line." 47 C.F.R. § 36.154(a) (1998).

[3] Subcategory 1.3 is defined as "Subscriber or common lines that are jointly used for local exchange service and exchange access for state and interstate interexchange services." 47 C.F.R. § 36.154(a) (1998).

2) ***Whether changes to § 36.154(b) are needed to appropriately allocate line costs associated with virtual special access tariffs like GTE's is a question currently pending before the Separations Joint Board.***

It is crystal clear that the precise separations question raised in part by the GTE tariff -- whether any changes to the existing Part 36 separations rules that apply to "mixed-use" special access tariffs (and require direct assignment of all line costs to the relevant jurisdiction) are needed -- is currently pending before the Separations Joint Board pursuant to an FCC referral. Indeed, the various orders and notices about the referral specifically seek comment on both (1) the Part 36 "direct assignment rules," *particularly* with respect to "unswitched" high capacity services, and (2) also the possible need to make any changes, via the Joint Board process, to those rules to address technological changes like special access services provided via a "virtual" private line. [4]

[4] See, *In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board,* CC Docket No. 80-286, 12 FCC Rcd 22120; 1997 FCC LEXIS 5554, October 7, 1997 Released; Adopted October 2, 1997 at ¶ 75, where the order discusses "Direct Assignment to Jurisdictions" and notes:"Under our existing separations rules, some costs are directly assigned to the interstate and intrastate jurisdictions . . .We invite comment on whether there are any additional costs that should be directly assigned to the jurisdictions . . .Parties are encouraged to comment, for example, on whether a significant number of the unswitched high-capacity services are jurisdictionally pure. If so, we ask for comment on how ILECs would identify the jurisdictional nature of such services. Commenters should address how opening of markets to competition . . .will affect the number of jurisdictionally pure services. We also ask how state and federal regulators could verify that a carrier had accurately assigned the facilities to the intrastate or interstate jurisdiction." Cf. ¶ 13,which is even more specific – in terms of suggesting changes to the existing application of Part 36 direct assignment rules to "virtual" private line circuits – stating that "[t]he introduction of new network control technologies changes the way services are delivered and thus calls into question the validity of service distinctions specified in the separations rules. For example, some private line services, which traditionally have been delivered over unswitched circuits that are dedicated to individual subscribers n37 can be distinguished from switched message services (such as message telecommunications service), which are delivered over switched circuits that are not dedicated to individual subscribers. n38 Increasingly, however, the provision of private line service is accomplished through the creation of virtual private lines that actually involve a switched transmission path, transporting private line service calls together with switched service calls. Modern

3) *Until the FCC can act on the Joint Board's recommendations, the FCC should clarify that GTE must comply with the current rules.*

As a general matter, the jurisdictional assignment of costs should be consistent with the both the FCC's rules and the jurisdictional assignment of revenues. As currently structured, the GTE tariff appears to avoid consistency with both the rules and general principles of cost allocation. As filed, it appears the GTE tariff assigns 75 percent of the local loop costs associated with xDSL to the intrastate jurisdiction using the general allocation factor for common lines, while all (100 percent) of the xDSL revenues would go to the interstate jurisdiction. GTE's apparent inconsistent allocation of costs and revenues exists even if the loops are used exclusively for xDSL service. This is already a very real possibility that will only become more likely over time as carriers seem to be concentrating their xDSL deployments in those markets also subject to in-roads by competitive local service providers. In such areas, it is likely that some end-users may take voice service from either a wireless or other facilities-based provider, e.g., cable, fixed wireless, etc, and xDSL service from GTE. Or an end-user could be utilizing the xDSL circuit itself for voice over the network applications. One must also consider that in many cases, if not the majority, loop facilities will have to be upgraded or "conditioned," at significant cost, just to provide this new service.

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switches can provide subscribers with switched virtual private line service that, from the subscribers' perspective, is indistinguishable from traditional unswitched private line service. Accordingly, it may be unnecessary for our separations rules to distinguish between virtual private line services and switched message services that use the same transmission paths and switches. We seek comment on whether these and other technological changes and network improvements have blurred the service distinctions specified in the separations rules and require modifications to Part 36."

Accordingly, NARUC respectfully requests that the FCC clarify that GTE must adhere to the existing Part 36 separations rules and directly assign the costs of the specific lines used for its xDSL services with respect to any customers' lines that are purchased service out of its interstate xDSL tariff.

C. *The FCC should disclaim the rationale proposed for allowing the tariff to go into effect or, at a minimum, clarify that the rationale presented is tentative, subject to further proceedings at the FCC, and in any case, is strictly limited to this order, and does not act in any way to foreclose or channel the determinations currently pending before the Separations Joint Board.*

NARUC agrees with many aspects of the partial dissent filed by Commissioners Tristani and Furchgott-Roth. NARUC would have preferred that the FCC allow the tariff to go into effect without the broader discussion "related to the jurisdictional nature of ISP traffic." See, *Separate Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani, Dissenting in Part* at 1. As their partial dissent notes, "the Commission face[d] no statutory deadline on the broader issue of the jurisdictional nature of ISP traffic." Id. By taking the approach suggested, the FCC could have avoided:

> ...the broader issue of whether ISP traffic over this DSL service is inherently interstate. Neither would such a decision have required the [FCC] to determine that "the communications at issue here do not terminate at the ISP's local server... but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user." [Footnote omitted] Nor would we need to conclude that "[t]he fact that the facilities and apparatus used for GTE's DSL service offering may be located within a single state does not affect our jurisdiction." Such sweeping statements about this agency's jurisdiction -- and even more importantly the logical application of that framework -- could have broad and even unintended implications for many state... decisions. *Id.*

NARUC agrees the Order's rationale does indeed have broad and potentially unintended implications, but not just for State commission decisions. Future FCC decisions will also be affected by the proffered rationale.

For example, in addition to the concerns raised by the FCC Commissioners, the rationale raises questions about

(1) the source of funding for meeting the obligations to assure availability of core facilities and services and for the promotion of advanced services under § 254(b)(3) in rural and high cost areas; and

(2) the inappropriate, or at least premature, extension of "end-to-end" analysis from the *Memory Call* order – a case where the "end-to-end" communications ended and terminated on the public switched network – to apply it to a case requiring the FCC to go behind an enhanced service provider's/end-user's interconnection point to determine the jurisdiction of a call. This extension, again at least prematurely, suggests treatment of enhanced service providers as common carriers as opposed to end-users.

Indeed, it would appear that the rationale places some limitations upon the Separations Joint Board process, at least with respect to the framework under which it must operate when examining Internet traffic provided via special access arrangements. NARUC believes the rationale proposed in the order prematurely raises questions best raised, at the earliest, after the Supreme Court issues its decision in the *Iowa Utilities Board v FCC* appeal. Clearly the scope of both State and FCC authority with respect to certain pricing issues will be delineated there. Also, some questions proffered by the Justices during the oral argument suggest that the Court might also discuss more expansively the impact of the reservation of State authority in Section 152(b) with respect to all of Title II of the Act. *Accordingly, NARUC respectfully requests that the FCC either disclaim the rationale proposed for allowing the tariff to go into effect or, at a minimum, clarify that the rationale presented is tentative, subject to further proceedings at the FCC, and in any case, is strictly limited to this docket, and does not act in any way to foreclose or channel the determinations currently pending before the Separations Joint Board.*

II. CONCLUSION

For the foregoing reasons, NARUC respectfully requests the FCC do the following:

- Clarify that its Order does not preclude States from requiring intrastate tariffs of xDSL services designed to connect end-users to Internet Service Providers ("ISPs"), including, but not limited to the service configuration outlined in the GTE tariff approved in this proceeding;.

- Clarify that the cost allocation procedures associated with this special access tariff remain in effect until the FCC can respond to a Separations Joint Board recommendation on any needed revisions.

- Either disclaim the rationale proposed for allowing the tariff to go into effect or, at a minimum, clarify that the rationale presented is tentative, subject to further proceedings at the FCC, and in any case, is strictly limited to this docket, and does not act in any way to foreclose or channel the determinations currently pending before the Separations Joint Board.

RESPECTFULLY SUBMITTED,

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NOVEMBER 30, 1998